BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES L. MCKNIGHT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,054,112
YORK INTERNATIONAL	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 21, 2011, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded authorized medical treatment with Dr. Lothes after the ALJ determined that claimant had suffered accidental injury which arose out of and in the course of his employment with respondent on November 15, 2010.

Claimant appeared by his attorney, Gary K. Albin of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Robyn Blackmore taken March 7, 2011, with exhibits; the deposition of Jerry Dubyak taken March 7, 2011, with exhibits; the deposition of Kathie Butman taken March 21, 2011, with exhibits; the deposition of Jeff Mullins taken March 21, 2011, with exhibits; the deposition of Jody Plush taken March 21, 2011, with exhibits; the transcript of Preliminary Hearing held March 24, 2011, with exhibits; and the documents filed of record in this matter.

ISSUE

Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent contends that claimant's conversations with his supervisors and with the healthcare providers treating his low back conflict with regard to the date of accident and how claimant's back was injured. Claimant

acknowledges that he is bad with dates and may have been confused as to when he suffered the low back injury.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Clamant worked for respondent as a line operator. This job necessitated that he handle blower motor housing units weighing from 20 to 45 pounds. These units would be loaded onto a cart, and claimant would then move the cart to a different location. It was while he was moving one of these loaded carts that claimant felt a pull in his back. This incident occurred just before claimant's shift was scheduled to end. A dispute exists as to whether this incident occurred on Friday, November 12, 2010, or Monday, November 15, 2010. The Form K-WC E-1 Application For Hearing (E-1) filed on January 12, 2011, claims a date of accident on November 12, 2010. However, at the preliminary hearing in this matter, claimant's attorney announced that claimant would probably file an amended claim alleging a date of accident on November 12, 2010, and a series thereafter.

On Monday, November 15, claimant attended a pre-scheduled medical recheck with respondent's Occupational Health Services (OHS). There he was examined by Robyn Blackmore, RN, for an injury to his right hand and wrist from approximately two weeks before. Claimant did not mention his low back during that visit. Additionally, Ms. Blackmore testified that claimant did not appear to be in pain and displayed no problems due to his low back. Claimant was scheduled to return for a further check-up the next day, Tuesday, November 16, 2010.

When claimant appeared at the beginning of his shift on November 15, he advised his lead, Kathie Butman, that he had done something on Friday and used heat and ice all weekend on his low back. Claimant then proceeded to do his job during the first four hours of his eight-hour shift. Shortly after his lunch period, which would have been about 8:00 p.m., claimant was moved to a light-duty position by Ms. Butman and Jodi Plush, claimant's supervisor on second shift. Claimant testified that as the shift progressed, his low back pain increased. By the time claimant was moved to the light-duty job, he was dropping things and having difficulty doing his job.

When claimant returned to OHS on November 16, he was experiencing significant low back pain. Ms. Blackmore noted that claimant was in obvious pain and was having difficulty walking. Claimant reported that he had injured his low back the night before while pulling a cart. Ms. Blackmore testified that she was very familiar with claimant as he was also coming into OHS for an elbow injury he had suffered earlier. She indicated that she regularly talked to claimant when he came in. When claimant advised that the pain was due to a work-related accident, she provided him an incident report to complete.

According to Ms. Butman, claimant first approached her shortly before the shift began on November 15, 2010. This would have been around 4:00 p.m. Claimant advised her that he had hurt his back during the weekend before and he was in pain. Claimant tried to "rough it out"[1] and do his job, but was unable to perform his regular duties for the entire shift. When claimant approached her at about lunchtime, he indicated that he could not continue his regular job. Ms. Butman then placed him on a less strenuous job, doing top panel prep and putting foam and stickers on panels. Ms. Butman then had a conversation with Ms. Plush regarding claimant's complaints.

Ms. Butman advised Ms. Plush, respondent's second shift supervisor, that claimant had injured himself over the weekend and was having problems performing his job. They decided that claimant should be moved to a lighter job so that he would not injure himself further. When Ms. Plush was told that claimant was filing a workers compensation claim, she was shocked. Her understanding was that claimant had been injured at home.

Jerry Dubyak, respondent's plant safety manager, and Jeffrey Edward Mullins, respondent's safety supervisor, were advised that claimant was alleging a work-related accident. While investigating this claim, they talked to claimant, Ms. Plush and Ms. Butman. The discrepancy in the date of the alleged accident and the timing of same convinced them to deny the claim. Claimant initially advised that the accident had happened on Monday, November 15, 2010. After Mr. Dubyak questioned claimant, he admitted that it may have actually occurred on the prior Friday.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

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[1] Butman Depo. at 9.

[2] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2010 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[6]

Claimant initially alleged a November 12, 2010, accident. However, he later advised the court that an amendment of his claim was probable, with the new date being November 12 and a series thereafter. Claimant's allegations of a work-related injury are hampered by the contact with his lead, Ms. Butman, on Monday, when she said that he alleged low back pain without alleging a work-related accident. Additionally, Ms. Blackmore was clear that claimant was not displaying any pain symptoms nor echoing any complaints of low back pain during the November 15, 2010, examination of his wrist. The fact that claimant discussed his pain symptoms and the fact he treated them with the heat and ice treatments over the preceding weekend also casts doubt on his claim.

However, claimant has been consistent in his allegation that he pulled something in his back while moving a cart. It is also significant that claimant testified to a worsening of his symptoms during the first half of his shift on November 15. Even if the accident occurred at home over the weekend, a worsening of a preexisting condition due to the labors of a job could render the injury compensable. Both Ms. Plush and Ms. Butman witnessed claimant beginning to drop things during the first half of his shift on November 15. They determined that claimant needed to be moved to a lighter job to avoid any further injury.

This Board Member cannot find that claimant suffered an accidental injury on November 12, 2010. However, claimant has also alleged a series of accidents. The fact

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

that he returned to work, which caused his condition to worsen, supports a finding that claimant did suffer personal injury by accident from a series of accidents and those accidents arose out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven by a preponderance of the credible evidence that he suffered personal injury by accident which arose out of and in the course of his employment with respondent through a series of accidents ending on November 15, 2010. Therefore, the Order of the ALJ granting claimant medical treatment for his low back is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated April 21, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2011.

HONORABLE GARY M. KORTE

c: Gary K. Albin, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[7] K.S.A. 44-534a.